CORRECTED COPY

Supreme Court, U.S.
FILED
AUG 8 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

NO. 79-171

ROBERT S. COOPER, JR.
Petitioner

Versus

THE DEPARTMENT OF THE NAVY OF THE UNITED STATES,
Respondent

Petition For Review On Writ of Certiorari
To The United States Court of Appeals
Fifth Circuit

5/7/79

EDWARD P. SUTHERLAND
144 Napoleon Street
Baton Rouge, Louisiana 70802
(504) 343-0237

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

594 F2d 484

INDEX

PAGE

Table of Cases ii

Reports of Opinions Below 1

Statement of Jurisdictional Grounds 2

Questions Presented For Review 2

Statutes and Regulations Involved 3

Statement of the Case 5

Argument 7

Conclusion 14

Certificate 15, 16

Appendix

(a) Original Opinion of District Court A-1

(b) Original Opinion of Fifth Circuit A-4

(c) Order of Remand A-17

(d) Certified Findings of Fact and Conclusions of Law A-19

(e) Opinion on Petition for Rehearing A-27

TABLE OF CASES

	PAGE
Brockway v. Department of the Air Force, 518 F.2d 1184 (8th Cir. 1975)	8, 9
Cooper v. The Department of The Navy of the United States, 594 F.2d 484 (5th Cir. 1979) No. 75-3100	7
Cooper v. The Department of The Navy of the United States, 558 F.2d 274 (5th Cir. 1977)	8, 9
Cooper v. The Department of The Navy of the United States, 396 F.Supp. 1040 (M.D. La., 1975)	6
Machin v. Zuckert, 316 F.2d 336 (D.C. Cir., 1963) *cert denied* 375 U.S. 869 (1963)	8, 9
Moveble Offshore, Inc. v. M/V Wilkem A. Falgout, 471 F.2d 268 (5th Cir. 1973)	12
Volkswagon of America, Inc. v. Jahre, 472 F.2d 557 (5th Cir. 1973)	12
Wilkins v. Hogan, 425 F.2d 1022, 1025 FN 1 (10th Cir. 1970)	13

IN THE
UNITED STATES SUPREME COURT

OCTOBER TERM 1978

NO.

ROBERT S. COOPER, JR.
Petitioner

Versus

THE DEPARTMENT OF THE NAVY OF THE UNITED STATES
Respondent

PETITION FOR REVIEW ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

REPORTS OF OPINIONS BELOW

1.

Original Opinion of The District Court, 396 F. Supp. 1040 (M.D. La., 1975).

2.

Original Opinion of The Fifth Circuit Court of Appeals, 558 F.2d 274 (5th Cir. 1977).

3.

Order of Remand - Fifth Circuit Court of Appeals, Unreported - Copy Addended.

4.

Certified Findings of Fact And Conclusions of Law, Unreported - Copy Addended.

5.

Opinion On Petition For Rehearing, 594 F.2d 484 (5th Cir. 1979).

STATEMENT OF JURISDICTIONAL GROUNDS

This Honorable Court is authorized to review the original opinion of the United States Court of Appeals for the Fifth Circuit dated August 29, 1977 and the opinion on rehearing dated May 7, 1979 in question by Writ of Certiorari under the provisions of the U.S. Code, Title 28, Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

I. Is a Navy Aircraft Accident Report (AAR) exempt from disclosure *in toto* under the exemptions provided for in The Freedom of Information Act, specifically 5 U.S.C. Section 522 (b)(5), which exempts "intra-agency memorandums or letters which would not be available at law to a party other than an agency in litigation with an agency"?

II. Did The Court of Appeals violate the clear error rule by disregarding the District Court's factual findings and conclusions as to the issue of waiver?

STATUTES AND REGULATIONS INVOLVED

1. 5 U.S.C. § 552(a)(3):

"Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (a) reasonably describes such records and (b) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person."

2. 5 U.S.C. § 552 (a)(4)(B):

"On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter *de novo*, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section and the burden is on the agency to sustain its action."

3. U.S.C. §552(b) in pertinent part:

"(b) This section does not apply to matters that are–

oooo

(5) inter-agency or intra-agency memorandums which would not be available by law to a party other than an agency in litigation with the agency;"

4. F.R.C.P. 52(a) in pertinent part:

"In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . ."

5. OPNAVINST 3750.6 J, CHAPTER IX ADMINISTRATIVE PROCEDURES §902(g) in perintnent part:

"(1) Accredited manufacturers' representatives and technical representatives cleared through the Naval Air Systems Command will be given access to the records of aircraft mishaps and statistics within the Naval Safety Center at the discretion of the Commander, Naval Safety Center. Reports, or those sections of reports, involving Naval policy and/or command matters will not be made available for their review; however, extracts of these reports, or sections of reports which pertain to material and design may be provided the manufacturers' repre-

sentatives at the discretion of the Commander, Naval Safety Center.

(a) Naval Plant Representative Officers (NAVPRO) will retain physical custody of all official written reports of investigations of aircraft mishaps. They should permit manufacturers and/or technical representatives to review and study the reports after they have been screened and controversial endorsements and/or command matters have been removed, but will not permit the latter to reproduce any portion thereof. NAVPRO may furnish summaries or extracts of factual technical information from the mishap reports pertaining to matters of design or performance, but with the complete understanding that all such information furnished will be used solely for the purpose of product improvement or accident prevention."

STATEMENT OF THE CASE

This cause was originally filed by the Plaintiff, Robert S. Cooper, Jr., an Attorney At Law, seeking to obtain copies of the official investigation of the Department of the Navy of the United States relating to a helicopter crash in the Mediterranean Sea, including, but not limited to, a complete copy of the JAG Manual Investigation Report and a complete copy of the Aircraft Accident Report (AAR) together with all exhibits contained therein under the authority of the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B).

The Defendant obtained a protective order avoiding discovery in the lower Court and filed a Motion for Summary Judgment.

The District Court Judge, the Honorable E. Gordon West, granted the Navy's Motion for Summary Judgment holding that the AAR was exempt *in toto* and holding that the JAG investigation had been sufficiently disclosed. *Cooper v. The Department of The Navy of the United States*, 396 F. Supp. 1040 (M.D. La., 1975).

From that judgment, Robert S. Cooper, Jr. appealed.

The United States Court of Appeals for the Fifth Circuit reversed the judgment of the District Court insofar as it pertained to the JAG Manual Investigation, holding that the JAG Manual Investigation was normally subject to disclosure *in toto*. However, the Fifth Circuit upheld the judgment of the District Court Judge by holding that the AAR was exempt from disclosure *in toto*. *Cooper v. The Department of the Navy of the United States*, 558 F.2d 274 (5th Cir. 1977).

Mr. Cooper timely filed a petition for rehearing on that portion of the judgment relating to the AAR on September 12, 1977, which, in effect, attacked the affidavit of the Secretary of the Navy, Jr. William Midendorf, II, on the basis that it was factually inaccurate and that the true policy of the Navy was to blanketly disclose AAR's to aircraft manufacturers. With regard to the AAR in question in this case, Mr. Cooper contended that the Navy disclosed at least a portion of said AAR to the defense lawyers for Sikorsky Aircraft, and had, therefore, waived any privilege which may have existed as to that document.

Because of the contentions raised on application for rehearing, the Fifth Circuit remanded the case to the District Court to determine to whom the AAR had been disclosed

and the legal effect of such disclosure, if any. Appendix.

The District Court Judge ordered certain interrogatories answered and the taking of depositions in this case. After the completion of discovery, Judge West issued his "Findings of Fact and Conclusions of Law" on February 13, 1979 holding that the Navy had waived any privilege which might have existed as to the entire AAR.

On rehearing, the Fifth Circuit overruled the findings of fact of the trial Judge and held that the privilege had been waived only as to a portion of the report. *Cooper v. The Department of The Navy of the United States*, 594 F.2d 484 (5th Cir. 1979) No. 75-3100.

From that ruling and from the earlier ruling of the Court of Appeals that an AAR is exempt *in toto*, Robert S. Cooper, Jr. seeks review by Writ of Certiorari.

ARGUMENT

1. This Honorable Court's discretion should be exercised by the granting of this Writ because a clear conflict has now been created between three Circuit Court's of Appeals as to whether an Aircraft Accident Safety Report conducted by one of the Armed Forces of the United States should be exempt *in toto* under 5 U.S.C. §552(b) (5).

2. The Writ should also be granted because this case involves an important question of federal policy, to wit, the judicial sanctioning of blatent impropriety and misconduct on the part of individuals within an Agency of the United States Government who have provided so-called "privileged" material to unauthorized individuals outside of the agency on

a wholesale basis.

3. Additionally, the Fifth Circuit has so far departed from the accepted course of judicial review in this case, i.e. the clear error rule, that to allow the decision below to stand would create an unhealthy judicial precedent.

1) In the original opinion rendered by the Fifth Circuit in this case, grave error was committed. Therein, the Fifth Circuit held that an Aircraft Accident Safety Report was exempt *in toto* from disclosure under the Freedom of Information Act. *Cooper v. The Department of the Navy of the United States*, 558 F.2d 275 (5th Cir. 1977). The Court reached its holding in spite of the fact that the Circuit Court of Appeals for the District of Columbia had held some fourteen years earlier that Aircraft Accident Safety Reports were only partially exempt because of government privilege, said privilege not extending to witness statements by government witnesses or other purely factual material. See *Machin v. Zuckert*, 316 F.2d 336 (D.C. Cir. 1963) *cert denied*, 375 U.S. 896 (1963).

As to *Machin* the Fifth Circuit states:

> "With respect, we are unable to follow the reasoning upon which this distinction (between private and service personnel) exists." 558 F.2d at 277 *paranthesis added.*

The Fifth Circuit did not agree with the *Machin* Court and declined to follow its reasoning.

The case of *Brockway v. Department of the Air Force*, 518 F.2d 1184 (8th Cir. 1975) cited *Machin* with approval and

gave lip service to the principals upon which it was based. However, when called upon to apply *Machin* to the witness statements at issue in *Brockway*, the Eighth Circuit, as correctly pointed out by the Fifth Circuit, simply failed to apply the *Machin* standard. *See* 558 F.2d 274 at 277-78.

Thus, a triple standard now applies to Exemption 5 of the Freedom of Information Act in regard to Aircraft Accident Safety Reports.

The Fifth Circuit would uphold nondisclosure of the entire AAR under FOIA Exemptions. The Eighth Circuit acknowledges that the "privilege" is limited to some extent but would uphold the nondisclosure of witness statements. The District of Columbia Circuit on the other hand would allow a much broader limitation on nondisclosure by the Agency.

It should be noted at this point that the *Machin* case predated FOIA by some years. It should also be remembered that Exemption 5 of FOIA was only designed to incorporate government privileges existing prior to the enactment of FOIA and that the general policy of FOIA was to grant greater access to the public to Government documents and information. Yet, *Brockway* and *Cooper* would grant less than the *Machin* Court allowed.

The result creates a conflict in the law which is unacceptable.

2) As petitioner has demonstrated in the lower courts and will vigorously redemonstrate to this Honorable Court, service generated Aircraft Accident Reports are misused on a wholesale basis by the manufacturers of aircraft. Petitioner and undersigned counsel have participated in litigation

against almost every major military aircraft manufacturer in the United States including, Lockheed, Boeing, McDonnell-Douglas and Bell, and in almost every case the lawyers for those companies have had access to the so-called "privileged" AAR's at their discretion, while the plaintiffs have been denied the same material on the basis of government privilege.

The evidence presented in the case at bar gives the clearest picture as to how this "leak" of information so readily occurs. And, the Fifth Circuit in footnote 2 of their opinion on remand recognizes the general disregard by the Navy of their own regulations:

> "2. We wish to make clear that we do not lack a considerable general sympathy with the district court's disposition on remand. The depositions taken leave grounds to suspect an all-to-cozy, "old-boy" relationship between Siskorsky employee DeVoe and contacts in the Navy, a relationship redounding to the unfair advantage of Sikorsky's defense counsel. Moreover, as we observed in footnote 1 above, the manner in which DeVoe-basically a legal investigator-seems to have been granted general access to the AARs of the Sikorsky NAVPRO either was not in compliance with Navy Regulations or raises grave questions about the propriety and fairness of the regulations themselves, as applied in practice. We hold no general warrant or roving commission to advise or caution the Navy. We do observe, however, that the loose practices apparent in this case very nearly compromised this AAR. If they should be widespread, they risk the effective destruction of the AAR program, for we cannot and will not tolerate its being run as an exclusive investigative device for either side of a lawsuit."

The Navy Regulations in question are appropriately cited in the opening sections of this Writ application [OPNAVINST 3750.6 J, CHAPTER IX ADMINISTRATIVE PROCEDURES § 902 (9) (1) and (2)]. By simply reading the strength of the wording of those regulations and then comparing those words to the prophylactic standards applied in practice by the Navy, as reflected by the evidence below, only one conclusion can be reached, that is, Navy personnel blatently disregard their own regulations and allow improprietous access by manufacturers' representatives to information specifically prohibited from disclosure by Navy Regulations.

Such a policy must not be allowed to be sanctioned by a judicial opinion which suffers no penalty to the Agency for their misconduct.

In this case, the impropriety is clear yet the sanction is nonexistent. With respect, this Honorable Court should correct that inequity.

3) There can be no question that the standard for review in a case such as this is the "clear-error standard" as is acknowledged by the Fifth Circuit. 594 F.2d 484 (5th Cir. 1979)

No better statement of the clearly erroneous standard can

be found than that made by the Fifth Circuit in the case of *Moveble Offshore, Inc. v. M/V. Wilkem A. Falgout*, 471 F. 2d 268 (5th Cir. 1973) where the court at page 271 recited:

> " 'A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed. United State v. United States Gypsum Co., 333 U.S. 364, 68 S. Ct. 525, 92 L.Ed. 746 (1948)., Hess Shipping Corp. v. S.S. Charles Lykes, 5 Cir. 1969, 417 F.2d 346, 349, aff'd en bane, 5 Cir., 424 F.2d 633, cert. denied, 400 U.S. 853, 91 S. Ct. 56, 27 L.Ed. 2d 91. The question is not simply whether the reviewing court would have found otherwise but whether the trial court could permissibly find as it did. The reviewing court should upset a finding *only when it is convinced on the whole record that the finding does not reflect the truth and right of the case.'* Wright, Federal Courts § 96, at 432." Emphasis added.

Thus, whether the somewhat modified test espoused in *Volkswagon of America, Inc. v. Jahre*, 472 F.2d 557 (5th Cir. 1973) is applied or not, the "clearly erroneous test" still applies and the trial court cannot be reversed unless the reviewing court is:

> " 'left with the definite and firm conviction that a mistake has been committed.' *See* United States v. United States Gypsum Co., 1948, 332 U.S. 364 395, 68 S. Ct. 525, 542, 92 L.Ed. 2d 746, 766. 472 F.2d at 559."

The plain language of the Fifth Circuit opinion on rehearing does not support the ultimate result that the Trial Judge committed clear error. At page 488 of the opinion the court states:

> "It follows that no evidence-only conjecture and suspicions which we confess we share-supports a finding or conclusion that their confidentiality has been breached or their privileged character under the FOIA waived." Emphasis Added

It is respectfully submitted that the Honorable Judges of the Fifth Circuit panel have let their desire to protect the intra-agency practices of the Navy at all costs cloud their vision as to what constitutes evidence.

Petitioner demonstrated to the trial Judge and will demonstrate to this Honorable Court that the only available evidence in this case, to-wit four depositions and a set of answers to interrogatories, though presenting no *direct evidence* to support petitioner's conclusions, sets forth substantial *circumstantial evidence*.

Circumstantial evidence has been defined as the proof of certain facts and circumstances in a given case from which the trier of fact may infer "other connecting facts which *usually and reasonably* follow according to the common experiences of mankind." See *Wilkins v. Hogan*, 425 F.2d 1022, 1025 FN 1 (10th Cir. 1970). (Emphasis Added)

The trial Judge had no difficulty concluding from the circumstantial evidence presented that the AAR in question

had been prejudiced. Nor did the Fifth Circuit have any difficulty sharing the trial Judge's "conjecture and suspicion." What else is conjecture and suspicion than the inference of "other connecting facts which usually and reasonably follow according to the common experiences of mankind" in the context of circumstantial evidence?

In effect, the Fifth Circuit is saying:

> "Petitioner, you have convinced us on the record as a whole that the District Court Judge's findings reflect the *truth and right* of the case. However, you have presented no evidence from which we can draw that conclusion."

How much more anomolous a statement can there be? Yet, it is respectfully submitted that that statement is a summary of a fair reading of the opinion on remand.

CONCLUSION

This case should be reviewed on Writ of Certiorari for the following reasons:

1. There is a division in the Circuit Courts on the issue presented herein;

2. To allow this decision to stand would allow the sanctioning of agency misconduct; and,

3. The Fifth Circuit has violated the clear error stand-

ard of review in this case.

Respectfully Submitted:

Edward P. Sutherland
144 Napoleon Street
Baton Rouge, Louisiana 70802
Telephone: 504/343-0237

CERTIFICATE

I hereby certify that a copy of the above and foregoing writ has been mailed this day, postage prepaid, to Mr. Thomas J. Wilson, Attorney at Law, Appellate Section, Civil Division, Department of Justice, Washington, D.C. 20530 and The Solicitor General, Department of Justice, Washington, D.C. 20530, this day of July, 1979.

Baton Rouge, Louisiana.

Edward P. Sutherland

CERTIFICATE

I hereby certify that a copy of the above and foregoing writ has been mailed this day, postage pre-paid to the Solicitor General, Department of Justice, Washington, D.C. 20530, this 20th day of July, 1979.

Baton Rouge, Louisiana.

EDWARD P. SUTHERLAND

APPENDIX A

ORIGINAL OPINION OF DISTRICT COURT

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

MINUTE ENTRY:
JUNE 19, 1975
WEST, J.

ROBERT S. COOPER, JR. — CIVIL ACTION

VERSUS — NUMBER 75-69

DEPARTMENT OF THE NAVY
OF THE UNITED STATES

* * * * *

This suit involves a demand by an attorney against the Department of the Navy for the production of certain documents in the possession of and under the control of the Department of the Navy. The attorney, who is the plaintiff in this action, has been retained by some third party to investigate the feasibility of bringing a civil suit against the manufacturer of a helicopter which crashed somewhere in the Mediterranean Sea causing the death of some or all of the occupants of the aircraft. No such suit has been filed at this time. The plaintiff is simply seeking in this suit access to all of the records pertaining to this accident which the Department of the Navy might have. There are two particular files which the plaintiff seeks. One is known as the Aircraft Accident Report (AAR) and the other is known as the

Judge Advocate General Manual Investigation Report (JAG Manual Report). The Department of the Navy has moved for summary judgment in this case and it is that motion which is before the Court. Counsel for both sides have agreed to present this matter to the Court on the record as it stands without oral argument and without the presentation of further evidence. Both sides have filed exhaustive briefs. Now, after due consideration of this record, and of the briefs filed by counsel, the Court concludes that the motion should be granted.

The Department of the Navy contends that the AAR is totally exempt from disclosure under the exemptions contained in the Freedom of Information Act, 5 U.S.C. § 552. More particularly, the defendant contends that 5 U.S.C. § 552(b)(5), which provides for the exemption from this Act of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency," specifically exempts the materials sought by the plaintiff. In addition to this, 32 CFR §701.1(h)(4) and (5) specifically provide for the exclusion from the Act of information which the Department of the Navy has received from anyone with the understanding that it will be retained on a privileged or confidential basis and also providing for the exemption from the Act of internal communications within and among agencies and components. As it pointed out by affidavits of various Navy officials, the purpose of the AAR is not to determine fault for the purpose of any litigation or defense, but it is solely for the purpose of improving the safety factors of airplanes. Everyone who gives information for the AAR is assured by the Navy Department that their information will be held in the strictest of confidence, and they are not required to give their information under oath. Because of these assurances,

oftentimes employees of manufacturers will give statements which are adverse to the manufacturer but which result in the Navy Department being able to improve the safety of future aircraft. It is the opinion of the Navy officials that if this assurance were not given, the information necessary to a continued improvement in air safety would be difficult if not impossible to obtain. Consequently, it is the position of the Department of the Navy that the entire AAR is exempt from disclosure because they themselves would be unable to use it in their own defense in view of the assurances given to the persons who supplied information for the makeup of the AAR. It is the opinion of the Court that this entire report is privileged under the provisions of the exemptions to the Freedom of Information Act and under the Code of Federal Regulations issued pursuant thereto.

As for the JAG Manual Report, the record discloses that the Navy has furnished the plaintiff with all factual matters contained in that report and have simply refused to furnish opinions or conclusions contained therein for inter-office or inter-agency purposes. This Court concludes that that is a sufficient disclosure of the material contained in the JAG Manual Report. For these reasons:

IT IS ORDERED that the defendant's motion for summary judgment in this case be, and it is hereby GRANTED, and this case is hereby DISMISSED.

s/ E. Gordon West
UNITED STATES DISTRICT JUDGE

Edward P. Sutherland, Esq.
Robert S. Leake, Esq.
Harland F. Leathers, Esq.
Jeffrey F. Axelrad, Esq.
Vincent B. Terlep, Jr., Esq.

APPENDIX B

ORIGINAL OPINION OF FIFTH CIRCUIT

Robert S. COOPER, Jr.,
Plaintiff-Appellant.

v.

The DEPARTMENT OF the NAVY OF the UNITED STATES,
Defendant-Appellee.

No. 75-3100.

United States Court of Appeals, Fifth Circuit

Aug. 29, 1977.

Attorney who represented family of person who was killed in Marine Corps helicopter crash brought action against the Department of the Navy for disclosure of the judge advocate general manual investigation report and the aircraft accident safety investigation. The United States District Court for the Middle District of Louisiana, E. Gordon West, J., 396 F. Supp. 1040, denied relief and attorney appealed. The Court of Appeals, Gee, Circuit Judge, held that: (1) aircraft accident safety investigation was exempt from disclosure under the inter-agency and intra-agency memoranda exemption of the Freedom of Information Act; (2) judge advocate general manual investigation report was generally subject to disclosure in toto, and (3) where service seeks to withhold portions of judge advocate general manual investigation report, normal procedure is for the district court to review the

contested matter to determine whether any matter should be withheld.

Affirmed in part and reversed in part.

1. Records 14

Need is not a criterion for disclosure under the Freedom of Information Act; if anyone can have the desired information, everyone can. 5 U.S.C.A. § 552.

2. Records 14

Purpose of the inter-agency or intra-agency memoranda exception to the Freedom of Information Act is to protect the consultative functions of government by furthering open and frank discussions within and between agencies of proposed administrative action. 5 U.S.C.A. § 552(b)(5).

3. Records 14

Navy aircraft accident safety investigation which is undertaken following an aircraft accident and for which witnesses are not sworn, are assured that their testimony will not be used in any legal or punitive proceeding, and are asked to give personal opinions and speculation is exempt for disclosure under the Freedom of Information Act as an inter-agency or intra-agency memorandum. 5 U.S.C.A. § 552(b)(5).

4. Records 14

Although Navy aircraft accident safety investigation contains primarily factual material, it is nonetheless exempt from

procedure under the Freedom of Information Act exemption for inter-agency and intra-agency memoranda since it can be expected to contain adverse comments and speculation obtained on promise of secrecy. 5 U.S.C.A. § 552(b)(5).

5. Records 14

Although Navy aircraft accident safety investigation is routinely forwarded to the Navy plant representative office at the factory at which the aircraft was manufactured, that limited disclosure, which is accompanied by limited access by manufacturer's technical representatives on a "need-to-know" basis does not constitute a waiver of the report's exemption from disclosure under the Freedom of Information Act exemption for inter-agency and intra-agency memoranda. 5 U.S.C.A. §552(b)(5).

6. Records 14

There is judicial review of the reasonableness of any promise of confidentiality given by an agency and relied upon by the agency as a basis for denying disclosure of information under the Freedom of Information Act. 5 U.S.C.A. § 552.

7. Records 14

Judge advocate general manual investigation reports prepared by Navy following airplane crash for the purpose of uncovering and documenting the facts of the accident with a view toward possible legal or administrative action are generally subject to disclosure under the Freedom of Information Act, despite the Act's exemption for inter-agency and intra-agency memoranda; where the Navy seeks to withhold portions of such a report, normal procedure would be

for the district court to review the contested matter to determine whether any matter should be withheld in order to safeguard the consultative or decision-making process. 5 U.S.C.A. §552(b)(5).

Appeal from the United States District Court for the Middle District of Louisiana

Before WISDOM, GEE and FAY, Circuit Judges.

GEE, Circuit Judge:

About three years ago, a United States Marine Corps helicopter crashed into the Mediterranean Sea near Crete while on a routine training mission. Appellant Cooper, a licensed attorney, was retained by the family of one who died in that crash to investigate the prospects of a wrongful death action against the aircraft's maker. Mr. Cooper asked the Navy to give him the reports of its investigations of the crash. It gave him some information but not all he wanted, and he brought this suit under the Freedom of Information Act.[1] When he did so, the Navy invoked executive privilege and moved for summary judgment on grounds that Mr. Cooper had gotten all of the reports he was entitled to under the Act and that the remaining reports and portions of reports were exempt from disclosure under the Act's exemption 5. The district court agreed, this appeal followed, and we affirm in part and in part reverse.

---

1. 5 U.S.C.§ 552 (as amended 1974).

The Investigations

From affidavits filed by defendant it appears that in this case, as it does in that of all major accidents, the Navy conducted two separate categories of investigations, each with its different procedures and different aims. The primary investigations, in the nature of an inquest, are known as the Judge Advocate General's Manual Investigations and have as their purpose the factual documentation of all matters pertaining to the accident which may serve as a basis for legal or administrative action. They are primarily concerned, therefore, with assessing property damage and unearthing possible negligence, neglect of duty, etc. They are independent of all other investigations. Witnesses are required to be warned of their statutory [2] and constitutional rights against involuntary self-incrimination. In investigations of the more serious class of incidents, a formal hearing is had, with sworn testimony.

The other investigation is called the Aircraft Accident Safety Investigation and is solely concerned with safety and the prevention of accidents. Unlike those for the JAG Manual Investigation, instructions for this investigation specify that witnesses are not to be sworn and will be assured that their testimony will not be used in any legal or punitive proceeding. Appeals are made to witnesses' concern for the safety of others, and personal opinions and speculation are invited. By such means, disclosures against interest are frequently obtained. An affidavit of the Secretary of the Navy, contained in the record, states that this investigation is a critical element of the flight-safety program, which over the

2. 10 U.S.C. § 831 (1956).

twenty-year period preceding the accident in this case has reduced fatalities from 285 per year to 43 and accidents per 10,000 flying hours from five to less than one. It is, he states, Navy policy that the reports of these investigations are not available even to Navy claims officials or Navy lawyers defending actions against the United States: only to those concerned with flying safety. And his affidavit goes on to assert that if the confidentiality of the safety investigation cannot be maintained, then there is no purpose in continuing to hold it in addition to the JAG Manual Investigations.

[1] Other affidavits assert that all factual matter in the JAG Manual Investigation has already been furnished Mr. Cooper and that there is no factual matter "of substance" in the report of the safety investigation (AAR) that has not already been furnished plaintiff from the JAG Manual Investigation report (JAGIR). Of necessity, these assertions are undisputed, since Mr. Cooper has had no opportunity to see either report. We have, however, examined the matter furnished Mr. Cooper, and it cannot be denied that this constitutes a mass of relevant material: the names, serial numbers and statements of numerous witnesses; flight schedules; audits of the pilots' flight experiences; medical reports; messages and dispatches in great number, including some containing opinions about the cause of the accident, [3] etc. In view of these disclosures, we cannot agree with appellant's assertions that the "only information available is in the hands of the Navy" or that his case is "paralyzed" by the Navy's non-disclosure. Though need is not a criterion for disclosure under the FOIA - if anyone can have the desired infor-

3. One dispatch, for example, remarks "Conclusions premature but lacking evidence of meterial failure it looked like a classic case of vertigo."

mation everyone can[4] - it appears that insofar as need is concerned, the Navy has already furnished Mr. Cooper sufficient information for a very good start indeed on his discovery.

The AAR

The parties have joined issue on the question whether exemption five of the FOIA applies to the AAR and the JAGIR so as to authorize non-disclosure of the former and only a partial disclosure of the latter. That section exempts from disclosure "Inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. §552(b)(5).

[2,3] As the Supreme Court has noted, the purpose of this exemption is to protect the consultative functions of government by furthering open and frank discussion within and between agencies of proposed administrative action. *Environmental Protection Agency v. Mink*, 410 U.S. 73, 87, 93 S.Ct. 827, 35 L.Ed.2d 119, quoting Mr. Justice Reed's opinion in *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F.Supp. 939, 141 Ct. Cl. 38 (1958). It seems plain, and the record bears out the notion, that in the circumstances of an aircraft accident investigation, assurances of confidentiality may be especially needed to obtain full disclosures. After all, something has gone wrong - perhaps gravely, even mortally wrong - under circumstances inherently dangerous. The machines and the procedures being employed are generally uniform and will be employed again tomorrow in the same manner unless altered. Is there something wrong with them generally? Or did the mishap (or

4. *Environmental Protection Agency v. Mink*, 410 U.S. 73, 92, 93 S. Ct. 827, 35 L.Ed. 2d 119 (1973).

catastrophe) occur because of a particular defect in a particular machine? Does a crew-chief believe (though not with enough confidence to swear to it) that a pilot was unwell or distracted on the occasion of a fatal flight? Does he recall that he forgot to secure some important assembly of the craft before the flight? To permit a breach of assurances of confidentiality given in order to obtain answers to such questions as these may perhaps provide access to more information in that particular case, but common sense tells us that it will likely also assure that in future cases such information will never see the light of day and will be of use to no one. Logic argues, then, that in such a circumstance as the Aircraft Accident Safety Investigation, where premises of confidentiality have been found helpful and perhaps essential to obtaining information upon which to base corrective action, those promises should be respected and the answers and speculations which they produce shielded from disclosure.

Nor is authority to the contrary. In the seminal case on executive privilege for such statements, *Machin v. Zuckert*, 114 U.S. App. D.C. 335, 316 F.2d 336 (1963), *cert. denied*, 375 U.S. 896, 84 S.Ct. 172, 11 L.Ed.2d 124 (1963), the Court noted and held:

> We agree with the Government that when disclosure of investigative reports obtained in large part through promises of confidentiality would hamper the efficient operation of an important Government program and perhaps even, as the Secretary here claims, impair the national security by weakening a branch of the military, the reports should be considered privileged.

316 F.2d, at 339. That court, however, limited the privilege

to disclosures by private (as distinguished from service) personnel, simply stating that the reasons advanced for non-disclosure did not apply to information obtained from service people, though the court "recognize[d] that there may be reasons not presently appearing to us why even this portion of the report should be immune from subpoena." 316 F.2d, at 340.

With respect, we are unable to follow the reasoning upon which this distinction rests. It is true that service personnel need not fear one consequence that may attend disclosures by a private person: suit against his employer, with its attendant unpleasantness for him. But service people are human, too: they fear disciplinary action, work and hope for promotion, possess loyalties and ties of friendship to people and organizations, dislike speculating to the derogation of others' reputations, especially those of the dead, etc. In short, they have a most gracious sufficiency of reasons for withholding derogatory information – if it is to reflect upon, or even be attributed to, them. Matters of good faith aside, we think ample basis exists for respecting assurances of confidence given them and that any attempted distinction between such assurances given them and those given private persons is not sound.

The language of the exemption itself affords no basis for any such distinction. Nor do the more recent cases appear to make any. In *Brockway v. Department of the Air Force*[5], for example, a decision holding the Air Force equivalent of the AAR immune under Exemption 5 from disclosure, *Machin* is cited with approval and the above language is quoted. But while the distinction drawn by *Machin* between dis-

5. 518 F.2d 1184 (8th Cir. 1975).

closures of private and service personnel is noted, it does not appear to have been applied. We likewise decline to do so.

[4,5] Appellant offers several subsidiary arguments, all respectable but none dispositive, for disclosure of the AAR. He points to the general fact-deliberative matter distinction, urging that Exemption 5 is primarily intended to protect ideas and recommendations exchanged in the deliberative process and not factual material.[6] But the sort of factual material which the AAR may be expected to contain - adverse comments and speculations, obtained on promise of secrecy - is surely as vital to the deliberative process as any opinion, since to be of any use opinions must have something to be "about." He points to the admitted circumstance that this particular AAR contains no witnesses' statements as such. But whatever information of a factual nature is contained in it was obtained upon the same promises as actual statements would have been, and the distinction sought to be made is one of form only. Finally, Appellee argues that whatever privilege might exist for the AAR has been waived by a regulation providing that a copy of it is to be forwarded "to the Naval Plant Representative Office at the factory at which the aircraft was manufactured." Since the AAR is thus "routinely furnished to aircraft manufacturers," Appellant claims, it is entitled to no protection. But Appellant misapprehends the effect of the regulation; the personnel in the Representative Office are employees of the Navy, not of the manufacturer.[7] And though

6. *See*, e. g., Soucie v. David, 145 U.S. App. D.C. 144, 448 F.2d 1067, 1077 n. 41 (1971), and cases there collected.

7. Indeed the regulation in question goes on to forbid sending the AAR to any plant where there is not a Naval Plant Representative Office. OPNAVINST 3750.6J, § 505(b)(1)(e).

other regulations do permit a limited access to the AAR by manufacturer's technical representatives on a "need-to-know" basis,[8] it is the law of this circuit that such limited disclosures to proper outside persons as are necessary to carry out effectively a purpose for assembling a governmental report in the first place do not waive its privilege. *Overby v. United States Fidelity & Guaranty Co.*, 224 F.2d 158 (5th Cir. 1955).[9] Doubtless a broadcast disclosure would be another matter, but we are unable to see reason in holding that a limited and proper use of the report for accident prevention purposes should work destruction of the confidentiality promised in assembling it and permit its use for the very purposes those whose disclosures made it possible were promised it would not be used for. Such a rule, where the AAR revealed possible defects in the aircraft as manufactured, would allow the Navy a Hobson's Choice between no use of the AAR or no AAR. Matters are not yet at such a stage.

[6] It may be objected that according, as we do, a general privilege to the AAR may in time promote the giving of broadcast and unnecessary assurances of confidentiality and cause the safety investigation to become primary, with the JAG Manual Investigation a mere charade. It has been observed, however,[10] and we agree, that there is judicial review of the reasonableness of any promise of confidentiality given by an agency. Nor is there much danger that the JAG Manual Investigation will atrophy; too many other procedures - disciplinary, compensatory, etc. - key into and commence from its factual findings.

---

8. *Id.* at § 902(g).

9. *Contra O'Keefe v. Boeing Co.*, 38 F.R.D. 329 (S.D.N.Y. 1965).

10. *Brockway v. Dep't of the Air Force*, 518 F.2d, at 1188.

As to the AAR, then, we find reason in the Navy's arguments that breaching its confidentiality would destroy or greatly diminish a highly effective safety program which has saved numerous lives and much government property. We are not disposed nor does the FOIA require that we decree such consequences in the name of appellant's convenience.[11]

The JAGIR

As we noted earlier, this report stands on a quite different footing than the AAR. It is the product of more formal procedures, it may incorporate sworn testimony, witnesses before it must be advised of their rights, etc. No considerations of confidentiality are involved in its production. The investigation which produces it is designated an "administrative fact-finding body,"[12] whose primary function is defined as "to search out, develop, assemble, analyze, and record all available information relative to the matter under investigation" and to "formulate clearly expressed and consistent findings of fact."[13] These are to form the factual basis for various actions, such as evaluating and modifying operating procedures, improving and redesigning equipment, replying to legitimate public inquiries, disposing of claims and redressing property damage, and making personnel decisions, It is true that the Manual is careful to characterize the JAGIR as "purely advisory," not a final determination, and not binding on convening or reviewing authorities.[14] But other regulations speak of it as "conducted for the factual documentation of all factual matters . . . which can be used for any legal

---

11. And convenience is all that is involved here, since the Navy has supplied appellant with much factual information contained in the JAGIR.

12. Manual of the Judge Advocate General 0201(a)(2).

13. *Id.* at 0201(b)(1).

14. *Id.* at 0201(c).

or administrative action,"[15] and it is difficult to avoid the impression that its basic (as distinguished from ultimate) fact-findings are likely to be final in the usual case.

[7] In a word, the basic thrust of the entire JAGIR project is fact-oriented: the uncovering and documenting of the facts of the accident. In this report, we view something like the mirror image of the memoranda we considered in *Wu v. National Endowment for Humanities*, 460 F.2d 1030 (1972). We characterized these as "recommendations [which] will usually contain some factual material but it is only incidental to their primary purpose, which is the expression of an opinion. . . ." 460 F.2d, at 1033. In the JAGIR, by contrast,establishing fact is the concern, any opinions found are incidental to this purpose, and no questions of confidentiality are present. It follows that the JAGIR will normally be subject to disclosure in toto, despite Exemption 5 of FOIA. Where, however, the Service in question seeks to withhold portions of such a report, the normal procedure will be for the district court to review the contested matter to determine whether any should be withheld in order to safeguard the consultative or decision-making process within or among the Services or their components. By contrast to the AAR, we do not believe the agency should have the almost-final say regarding disclosure of this fact-steeped report. Since we cannot determine from the record that this has been done here, we vacate the judgment below to this extent only and remand for such an *in camera* examination and judgment accordingly.

It is so.

ORDERED.

15. OPNAVINST 3760.6J § 402(d).

APPENDIX C

ORDER OF REMAND

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-3100

ROBERT S. COOPER, JR.,
Plaintiff-Appellant,

versus

THE DEPARTMENT OF THE NAVY OF THE UNITED STATES
Defendant-Appellee.

FILED: Jan. 31, 1979

Appeal from the United States District Court for the Middle District of Louisiana

Before WISDOM, GEE and FAY, Circuit Judges.

BY THE COURT:

It is being seriously asserted on rehearing that distribution of the report of the Aircraft Accident Safety Investigation in this case has been, contrary to the expressed belief of the Secretary of the Navy in his affidavit herein, made to persons other than those officials concerned with flight safety, *i.e.*, defense counsel for Sikorsky Aircraft Corporation;

IT IS ORDERED that the cause be remanded to the district court for it to determine, after an appropriate hearing, to whom the above report has been disclosed and the legal effect of such disclosures, if any, and certify the record and its findings and conclusions to us. Petition for rehearing will be held in abeyance on the docket of this panel pending receipt of the above certificate.

APPENDIX D

CERTIFIED FINDINGS OF FACT AND CONCLUSIONS OF LAW

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

ROBERT S. COOPER, JR. — **CIVIL ACTION**

VERSUS — **NUMBER 75-69**

THE DEPARTMENT OF THE NAVY OF THE UNITED STATES

FILED: Feb. 13, 1979

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff in this case is an attorney at law who was retained by the widow of a deceased Navy captain to determine whether or not she might have a meritorious claim arising out of her husband's death as a result of a crash of a Sikorsky CH 53 helicopter. Plaintiff, in the course of his investigation, requested the Department of the Navy to furnish him with copies of its investigation reports compiled as a result of this accident. The two reports specifically requested were the JAG Manual Investigative Report (JAG Report) and the Aircraft Accident Report (AAR). Plaintiff was furnished what he describes as "an incomplete copy of the factual material contained in the JAG Manual Investigative Report" (JAG Report), but was denied any access to the AAR. This suit was then filed under the "Freedom of Information

Act," 5 U.S.C. § 552, et seq., wherein the plaintiff seeks access, particularly, to the AAR. Defendant, the United States Navy Department, contends that that report is exempt from disclosure or discovery under Section 552(b)(5), which provides that the Act does not apply to:

> "(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;. . ."

Plaintiff counters that any exemption to coverage of the Act that might have existed in this case has been waived by the actions of the Navy. This Court initially held that the AAR involved was totally exempt from discovery, and that the JAG Report had been sufficiently divulged to the plaintiff to warrant a dismissal of plaintiff's request for further discovery and the entire case was thus dismissed. That decision was appealed to the Fifth Circuit Court of Appeals, and the judgment of this Court was affirmed. Plaintiff applied for a rehearing, urging that the AAR had, contrary to express belief of the Secretary of the Navy, been distributed to persons other than those authorized by Navy regulations, and other than officials concerned with flight safety, and particularly, to defense attorneys for the Sikorsky Aircraft Corporation and to certain insurance personnel. Plaintiff contends that such distribution waives whatever protection the report might have had because of exceptions to the general applicability of the Freedom of Information Act.

As a result of this representation the Court of Appeals held in abeyance the petition for rehearing and remanded the matter to this Court:

> ". . .for it to determine, after an appropriate hearing, to whom the above report has been disclosed and the legal effect of such disclosures, if any, and certify the record and its findings and conclusions to us."

Pursuant to this mandate, additional discovery was had, including the taking of four depositions, and by agreement of counsel, the matter was then submitted to this Court on the record and briefs of counsel without oral argument. This Court has now carefully considered the additional evidence placed in the record by way of these depositions, and now makes the following findings and conclusions which will be certified to the Fifth Circuit Court of Appeals in accordance with its mandate.

At the outset, it should be noted that all four persons whose depositions were taken are in some way or another aligned with the defendant, the Department of the Navy of the United States.

The first deposition considered is that of Capt. Augustus A. DeVoe, Jr. He is a retired Navy captain and is in the inactive reserve. He is currently employed by Sikorsky Aircraft as a civilian flight safety engineer, and has been so employed for the past twenty-three years. While his duties include design and operational safety, the major part of his work apparently involves accident investigation and litigation. Capt. DeVoe, in his deposition, admitted having access to AAR's in prior cases, and admitted making such reports, or such portions of reports as he may have had available to him, to defense counsel in other cases. In connection with the current litigation, he remembers seeing what is referred to as the "fourth endorsement" to the AAR which contained conclu-

sions and opinions as to the cause of the accident. This endorsement was retained in Capt. DeVoe's file for possible use in this litigation. He sent it, or a copy of it, to Sikorsky's defense attorneys. While he is not positive of this fact, he feels that it is entirely possible that he did have access to the entire AAR in this case. Capt. DeVoe stated that while there are supposed to be certain clearance procedures to obtain these reports, and only certain people were supposed to see them for certain purposes, he does not have any idea how this report, or its fourth endorsement, got onto his desk. He speculated that he may have received it from the Service Department, the Products Support Department, or a Navy field representative. A recapitulation of Capt. DeVoe's testimony indicates that he is basically an employee of Sikorsky who obtains and funnels data to Sikorsky's defense attorneys. He has, on previous occasions, given all or portions of AAR's to those attorneys. As to this accident, he probably saw the entire report, but he certainly saw, and passed on to defense counsel, the fourth endorsement to the report which contained the opinions and conclusions which the Navy is now trying to protect. He is not cleared by any special procedure, nor is he a person authorized by Navy regulations to have access to these reports, but he seems to have had ready access to AAR's by virtue of his employment with Sikorsky.

The second person deposed was Mr. William F. Harms. He is employed by United Technologies Corporation as a products liability representative. His duty is to investigate accidents and coordinate investigation activities with the various divisions of the company that are affected by an accident, and when litigation commences, he coordinates activities between the company and its defense counsel and also with its insurance representatives. While in this employ, he has

seen at least portions of the AAR pertaining to the current accident, including the fourth endorsement. He believes he got the report through normal U.S. mail from Sikorsky flight safety office, and more specifically, from Capt. DeVoe. He undoubtedly sent the report, or a copy of the report, to one of Sikorsky's defense counsel, Mr. Robert Gaines. He believes he also sent the report, or a copy of the report, to Associated Aviation Underwriters, an insurance company for whom he used to work. He testified that he had received, and had access to, similar AAR's pertaining to other accidents. It was his testimony that he never received a complete AAR. Some parts were always deleted. While he states that he does not remember ever receiving the opinion and conclusions section of the report in question, he does, nevertheless, specifically remember receiving the fourth endorsement in this case (which did, in fact, contain the opinions and conclusions of defendant in connection with this accident.) As far as he knows, there is no special clearance procedure involved in procuring these reports. In summary, Mr. Harms testified that he received the fourth endorsement, and possibly other portions of the AAR, from Capt. DeVoe. Whatever material he received he sent to defense counsel and to some insurance company personnel. While he knows that these reports were "guarded documents," he nevertheless furnished them to people who had no part in aircraft safety programs or product redesign, and who were not authorized by Navy regulations to receive them.

The next deponent was Lt. Commander Ernest T. Lindberg, Jr. He is a JAG officer and is Assistant Division Director in the defense of civil litigation involving the Navy. While he was unaware of the fact that defense attorneys had any part of the AAR in question, he was aware of the fact that the fourth endorsement had been acquired by United Tech-

nologies Corporation. He testified that he was unable to determine who had released it, but that the release was unauthorized. He stated that no lawyer should have access to it. The only people to whom it should be available are those involved in aircraft safety. But as far as he knows, there is no strict guidance as to the procedure to be used in disseminating the information contained in the AAR's.

The last deposition is that of Capt. Murl Edwin Husted, Jr. He is currently Deputy Chief of Naval Operations for Air Warfare. He testified that an endorsement is merely a chain of command agreement with the contents of an AAR. He further testified that normally the endorsements are not separated from the complete report, and it is not Navy policy to allow a manufacturer's flight safety personnel to see the AAR out of the presence of authorized Navy personnel. But he somehow failed to ask the Sikorsky representative whether or not he had permitted people, such as Capt. De Voe, to view all or part of the report. To forget to ask that question might indicate what the answer would have been, particularly in view of Capt. DeVoe's testimony that he positively saw the fourth endorsement and probably other portions of the report. It would seem to indicate also that the report and the endorsement were in fact not separated, and that people such as DeVoe, Harms, defense counsel, and insurance company personnel did indeed have access to the complete AAR.

A review of all of the testimony leads this Court to the conclusion that in this case, and very probably in many other than those authorized by Navy regulations to see them. Whether it results from negligence, or from voluntary and knowing acts on the part of Navy personnel, the fact remains that the release of these reports to persons other than

those authorized by Navy regulations can be traced directly to the Department of the Navy. While the Navy field representative at the Sikorsky plant apparently had the authority to obtain the AAR, access to the report did not stop there. It went to people not primarily concerned with aircraft safety, but instead concerned with litigation resulting from an accident. Capt. DeVoe, Mr. Harms, Attorney Arnold, and Attorney Gaines, together with unnamed insurance company personnel, and probably other attorneys, had access to all or parts of this AAR. In addition, it is important to note that both Capt. Husted and Lt. Commander Lindberg testified that copies of AAR's and endorsements were knowingly distributed to commands and officers not specifically authorized by Navy regulations to receive them. Indeed, the Navy plant representative at Sikorsky was not specifically authorized by regulations to receive the report, but it was apparently regular procedure to make these reports available to him. Thus, the Navy did not adhere to its own regulations pertaining to the dissemination of information contained in these AAR's and should now be held to have waived the exemption which it might have had under the Freedom of Information Act insofar as this particular report is concerned. The Navy Department simply cannot permit these reports to be available to some people, who are not authorized under its own regulations, to have them, and then deny the same privilege to others. In this case it would be grossly unfair to permit this report to be available to defense counsel and to insurance company personnel, and at the same time deny plaintiff and his client access to it. This Court concludes that in this case, the defendant has waived any right that it might otherwise have had under the provisions of 5 U.S.C. §552(b)(5) to withhold the AAR in question from the plaintiff.

This will constitute the Court's findings and conclusions as requested by the Fifth Circuit Court of Appeals, and this matter is now certified to that Court for its consideration.

Baton Rouge, Louisiana, February 13, 1979.

s/ E. Gordon West
UNITED STATES
DISTRICT JUDGE

APPENDIX E

OPINION ON PETITION FOR REHEARING

Robert S. COOPER, Jr.,
Plaintiff-Appellant,

v.

The DEPARTMENT OF the NAVY OF the UNITED STATES,
Defendant-Appellee.

No. 75-3100.

United States Court of Appeals, Fifth Circuit

May 7, 1979.

An attorney representing family of a person killed in a Marine Corps helicopter crash brought action against the Navy for disclosure of an investigation report and aircraft accident report. Relief was denied by the United States District Court for the Middle District of Louisiana, E. Gordon West, Chief Judge, 396 F.Supp. 1040, but the Court of Appeals affirmed in part and reversed in part, 558 F.2d 274. After additional findings were made on remand, the Court of Appeals, Gee, Circuit Judge, held that in light of depositions furnished on remand, there was a waiver by the Navy of Freedom of Information Act exemption with respect to the fourth endorsement of a command level upon the aircraft accident report, but no waiver as to the body of the report or other endorsements.

Rehearing granted to extent of modifying mandate, and otherwise denied.

---

1. Federal Courts 792, 854

Where evidence before district court consisted of depositions, the court hearing no live witnesses, review of such factual findings by Court of Appeals was governed as usual by clearly erroneous standard but burden of establishing clear error was not so heavy as in normal case.

2. Records 55

Where Navy had failed to adhere to its own regulations pertaining to dissemination of information contained in aircraft accident reports and information contained in endorsement thereon had been disseminated to persons not authorized under regulations to have them, including defense counsel, privilege under Freedom of Information Act was waived with respect to such endorsement. 5 U.S.C.A. § 552.

3. Records 57

Possession of endorsement which was merely general comments of one command level upon aircraft accident report did not indicate possession of entire report, and exemption under Freedom of Information Act, as to body of aircraft accident report and other endorsements was not shown to have been waived. 5 U.S.C.A. § 552.

Appeal from the United States District Court for the Middle District of Louisiana.

ON PETITION FOR REHEARING

Before WISDOM, GEE and FAY, Circuit Judges.

GEE, Circuit Judge:

This cause concerns an attempt by counsel representing the survivors of one killed in the crash of a Marine Corps helicopter to obtain access via the Freedom of Information Act to reports of certain investigations of the accident.

Our initial opinion, reported at 558 F.2d 274, details the facts and progress of the case and contains the following observations, to which we adhere:

> Finally, Appellee argues that whatever privilege might exist for the AAR has been waived by a regulation providing that a copy of it is to be forwarded "to the Naval Plant Representative Office at the factory at which the aircraft was manufactured." Since the AAR is thus "routinely furnished to aircraft manufacturers," Appellant claims, it is entitled to no protection. But appellant misapprehends the effect of the regulation; the personnel in the Representative Office are employees of the Navy, not of the manufacturer. And though other regulations do permit a limited access to the AAR by manufacturer's technical representatives on a "need-to-know" basis, it is the law of this circuit that such limited disclosures to proper outside persons as are necessary to carry out effectively a purpose for assembling a governmental report in the first place do not waive its privilege. *Overby v. United States Fidelity & Guaranty Co.*, 224 F.2d 158 (5th Cir.

1955). Doubtless a broadcast disclosure would be another matter, but we are unable to see reason in holding that a limited and proper use of the report for accident prevention purposes should work destruction of the confidentiality promised in assembling it and permit its use for the very purposes those whose disclosures made it possible were promised it would not be used for. Such a rule, where the AAR revealed possible defects in the aircraft as manufactured, would allow the Navy a Hobson's Choice, between no use of the AAR or no AAR. Matters are not yet at such a stage.

558 F.2d at 278 (footnotes omitted, emphasis original).

Plaintiff Cooper asserted on rehearing that distribution of one of the reports sought, the AAR, was indeed made broadcast in this case rather than as indicated in the affidavit of Secretary of the Navy Middledorf. In response to this assertion, we remanded for a determination of to whom the report had gone and the legal effect of that distribution.

The district court permitted additional discovery, which revealed that part of the AAR in question had indeed received wider distribution than had been indicated by the former record. Specifically, the court found and concluded as follows:

A review of all of the testimony leads this Court to the conclusion that in this case, and very probably in many other cases, there has been a distribution of AAR's to people other than those authorized by Navy regulations to see them. Whether it results from negligence, or from voluntary and knowing acts on the part of Navy personnel, the fact remains that the release of these reports to persons

other than those authorized by Navy regulations can be traced directly to the Department of the Navy. While the Navy field representative at the Sikorsky plant apparently had the authority to obtain the AAR, access to the report did not stop there. It went to people not primarily concerned with aircraft safety, but instead concerned with litigation resulting from an accident. Capt. DeVoe, Mr. Harms, Attorney Arnold, and Attorney Gaines, together with unnamed insurance company personnel, and probably other attorneys, had access to all or parts of this AAR. In addition, it is important to note that both Capt. Husted and Lt. Commander Lindberg testified that copies of AAR's and endorsements were knowingly distributed to command and officers not specifically authorized by Navy regulations to receive them. Indeed, the Navy plant representative at Sikorsky was not specifically authorized by regulations to receive the report, but it was apparently regular procedure to make these reports available to him. Thus, the Navy did not adhere to its own regulations pertaining to the dissemination of information contained in these AAR's and should now be held to have waived the exemption which it might have had under the Freedom of Information Act insofar as this particular report is concerned. The Navy Department simply cannot permit these reports to be available to some people, who are not authorized under its own regulations, to have them, and then deny the same privilege to others. In this case it would be grossly unfair to permit this report to be available to defense counsel and to insurance company personnel, and at the same time deny plaintiff and his client access to it. This Court concludes that in this case, the defendant has waived any right that it might otherwise have had under the provisions of 5 U.S.C. § 552(b)(5) to withhold the AAR in question from the plaintiff.

Our Standard of Review

[1] Among the curious features of this unusual case has been that the most telling presentation by each advocate has come at an eleventh hour. As we have noted above, it was a motion for rehearing by Mr. Cooper that launched us on this phase of the case. Now the force of the Navy's brief attacking the findings and conclusions of the district court has required us to scrutinize with great care the evidence relied on below to support them. This evidence consisted of four depositions, the court hearing no live witnesses. In these circumstances, though our review of these factual findings is governed as usual by the clearly-erroneous standard, the burden of establishing clear error is not so heavy as in the normal case. *Volkswagen of America, Inc. v. Jahre*, 472 F.2d 557 (5th Cir. 1973). This follows since we view precisely the same evidence as did the trial judge, from the same vantage point, neither tribunal being aided by those advantages in assessing witness credibility that flow from observing demeanor, reactions and manner of testifying.

The Evidence on Remand

Of the four depositions, perhaps the most revealing is that of Augustus DeVoe, a retired Navy Captain and highly-placed flight safety engineer for Sikorsky Aircraft, the helicopter's manufacturer. Captain DeVoe's testimony makes clear that the great body of his work consists of investigating accidents and coordinating the resulting information for counsel defending lawsuits brought against Sikorsky. His job also requires some design and operational safety work, but he candidly described these facets of it as "part time," with the major emphasis on litigation-related concerns.

He also candidly admitted having had possession of the fourth endorsement to the AAR in this case. As the record reveals and as, doubtless, is a matter of common knowledge, the military services employ the device of "endorsements" on reports and correspondence as they pass up the chain of command. Among the offices of these is to offer each command level an opportunity to state agreement, disagreement or reservations about the document's conclusions as it makes its way up the chain.

The endorsement which came into Captain DeVoe's hands consisted of the comments on this AAR of the Commanding General, Marine Fleet Force, Atlantic. We have read this endorsement with care – no very taxing task, since shorn of formal matter it contains less than 400 words. Aside from general observations about the importance of observing safety measures and procedures and maintaining proper command supervision, the endorsement broadly approves the AAR and observes that the accident was apparently the result of pilot error. The inference is strong that this was also a general conclusion of the AAR, but this is not certain from the endorsement. What its other, conclusions if any, were remains undisclosed. Nothing can be told from the endorsement about detailed findings or conclusions of the AAR, assuming there were such.

Captain DeVoe testified further that he had seen AARs at various times but had not had possession of one since twenty years or so ago when, he testified, "[t]hings were a lot looser." He recalled having seen substantially all of one Navy AAR only in the last five years, one which was produced in connection with another lawsuit. As for the fourth endorsement, he did not remember where he got it – though he claimed it was not from the Navy Plant representative Officer

(NAVPRO) at Sikorsky – but he was sure he sent it on to company defense counsel, a manifest impropriety.

As for the basic AAR itself in this case, as distinguished from its endorsements, DeVoe did not believe he had ever seen it, though he admitted this was a possibility. He also admitted to having general personal access to the AARs on file in the office of the NAVPRO at Sikorsky, though this included only reading them "on the spot," any notes taken being required to be censored to remove names, places, etc.

Another deponent in this case was Mr. William F. Harms, the product liability representative of Sikorsky's parent corporation. His job is to coordinate the defense of such claims as appellant Cooper's. He testified that he had seen the fourth and possibly another endorsement, but not the body of this AAR. He thought he had gotten it from Captain De Voe and that he passed it on to Sikorsky attorneys. He disclaimed ever having seen so much as significant portions of a Navy AAR, let alone an entire one.

Navy witnesses testified to an investigation conducted by them to determine how the fourth endorsement came into DeVoe's hands. As a result of this they had concluded that no authorized release of the fourth endorsement was made, that no other portion of the AAR had been disclosed so far as they could tell, and that they could not determine with any certainty who sent the endorsement to DeVoe. From certain codes on the document they suspected, however, that the endorsement came from headquarters of the Commander, Naval Air Force, Atlantic Fleet.

Waiver as to the Fourth Endorsement

[2] Thus, to summarize, these depositions suggest that Captain DeVoe, a civilian expert with Sikorsky primarily concerned with litigation investigation and defense, obtained the fourth endorsement to this AAR from some anomalous source within the Navy (or perhaps from the office of the Sikorsky NAVPRO) and gave it to Sikorsky defense counsel. And though this release was not directly authorized by the Navy, it also appears that DeVoe had general authorized access to the body of AARs in the office of the NAVPRO at the Sikorsky plant, though he was not permitted unsupervised possession of them and was supposed to omit names, places, etc. from his notes about them.[1] We think

1. At the relevant times, release of matter such as the AAR to NAVPROs and manufacturer's technical representatives was governed by OPNAVINST 3750.6J, § 902(g), reading in pertinent part:

> g. Release of Information to Technical Representatives and Contractors.
>
> (1) Accredited manufacturers' representatives and technical representatives cleared through the Naval Air Systems Command will be given access to the records of aircraft mishaps and statistics within the Naval Safety Center at the discretion of the Commander, Naval Safety Center. Reports, or those sections of reports, involving Navy policy and/or command matters will not be made available for their review; however, extracts of these reports, or sections of reports which pertain to material and design may be provided the manufacturers' representatives at the discretion of the Commander, Naval Safety Center.
>
> (2) Naval Plant Representative Officers (NAVPRO) will retain physical custody of all official written reports of investigations of aircraft mishaps. They should permit manufacturers and/or technical representatives to review and study the reports after they have been screened and controversial endorsements and/or command matters have been removed, but will not permit the latter to reproduce any portion thereof. NAVPRO may furnish summaries or extracts of factual technical information from the mishap reports pertaining to matters of design or performance, but with the complete understanding that all such information furnished will be used solely for the purpose of product improvement or accident prevention.

these circumstances support the findings and conclusions of the district court as to the fourth endorsement to the AAR sufficiently that they are not clearly erroneous.

It is intolerable that such confidential documents should be furnished to one side of a lawsuit and not to the other. To be sure, an aunauthorized filching of the document would not in the normal course operate as a waiver of the Navy's right to withhold it. But where, as here, a company representative primarily concerned with litigation is, pursuant to wearing his "other hat" – a subsidiary responsibility for aircraft design and operational safety, permitted general access to guarded matter and a copy of it appears in defense counsel's hands, a determination that its confidentiality has been waived is not clearly wrong. True, as we made plain in our original opinion, the savings in lives and property which the AAR process has produced justify guarding the confidential procedures by which such reports are assembled. But, like rank, privileges such as these carry corresponding responsibilities, and we concur in the district court's refusal to permit them to be trifled with as they were here. The Navy's privilege to withhold this endorsement was properly held to have been waived.

(Footnote 1 - continued)

Thus it appears that while wearing his flying safety hat Captain De Voe was entitled to a limited access to AARs via either of the above methods. Neither seems to have properly applied in this case; and even had they been so applied, serious questions are raised by DeVoe's dual status. The fourth endorsement may have come into his hands either from an anomalous Navy source or from the Sikorsky NAVPRO; there is no indication whatever that it came from the Naval Safety Center via the discretion of its Commander. If the former, regulations were manifestly violated. If the latter, they were breached in several less-blatant ways; by giving him physical custody of the endorsement; by permitting him to see this endorsement -- clearly a "controversial endorsement and/or command matter" – at all; by permitting him to reproduce it; and by the use that he made of it.

No Waiver as to the Remainder

[3] The case is otherwise, however, as to the body of the AAR and its other endorsements. There is little or no evidence in this record that the confidentiality of these has been compromised at all, let alone by authority of the Navy. No one admits to having misused them or to furnishing them to the defense. Even Captain DeVoe could not be sure he had seen them. No one testified that they were furnished to any unauthorized person, nor have they been found in any such hands. The fourth endorsement does not disclose them, though the conjectures it permits about their general tenor are now as available to the plaintiff as to the defense. This endorsement is merely the general, the very general, comments of one command level upon them. Its form is that of a separate message. We do not concur in the district court's conclusions that possession of it indicates possession of the entire AAR.

It follows that no evidence – only conjecture and suspicion, which we confess we share – supports a finding or conclusion that their confidentiality has been breached or their privileged character under the FOIA waived. This does not suffice, and the district court's determination that they have been is clearly erroneous. The fourth endorsement's confidentiality has been waived and it must be disclosed; that of the remainder of the AAR has not been, on the present showing, and it need not be.[2] To the above extent only, rehearing

---

2. We wish to make clear that we do not lack a considerable general sympathy with the district court's disposition on remand. The depositions taken leave grounds to suspect an all-too-cozy, "old-boy" relationship between Sikorsky employee DeVoe and contacts in the Navy, a relationship redounding to the unfair advantage of Sikorsky's defense counsel. Moreover, as we observed in footnote 1 above, the manner in which DeVoe -- basically a legal investigator -- seems to have been

is granted and the mandate of the court is modified as indicated; it is otherwise DENIED.

(Footnote 2 - Continued)

granted general access to the AARs of the Sikorsky NAVPRO either was not in compliance with Navy Regulations or raises grave questions about the propriety and fairness of the regulations themselves, as applied in practice. We hold no general warrant or roving commission to advise or caution the Navy. We do observe, however, that the loose practices apparent in this case very nearly compromised this AAR. If they should be widespread, they risk the effective destruction of the AAR program, for we cannot and will not tolerate its being run as an exclusive investigative device for either side of a lawsuit.